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EXECUTIVE SECRETARY

February 24, 1999

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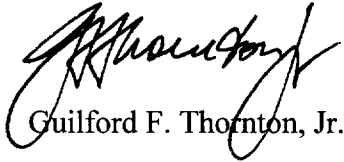
RE: Application of BellSouth BSE, Inc. for a Certificate of Convenience and
Necessity to Provide Intrastate Telecommunications Services
Docket No. 98-00879

Dear Mr. Waddell:

I am enclosing with this letter an original and thirteen (13) copies of BellSouth BSE, Inc.'s Objection to the First Report and Recommendation of Hearing Officer for filing in the above referenced matter. Copies have been served on counsel for parties of record.

Should you have any questions or require anything further at this time, please do not hesitate to contact me.

Sincerely,



Guilford F. Thornton, Jr.

GFT/lb

cc: Robert C. Scheye

BEFORE THE TENNESSEE REGULATORY AUTHORITY

Nashville, Tennessee

In Re:

**Application of BellSouth BSE, Inc.
for a Certificate of Convenience
and Necessity to Provide Intrastate
Telecommunications Services**

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Docket No. 98-00879

Objection to First Report and Recommendation of Hearing Officer

BellSouth BSE, Inc. ("BSE") files this Objection to the First Report and Recommendation filed on February 18, 1999 by Chairman Melvin Malone as Hearing Officer in this matter. Specifically, BSE opposes the recommendation made by the Hearing Officer that the Authority hold this matter in abeyance until such time as the Tennessee Court of Appeals disposes of an appeal filed by BSE of the Authority's December 8, 1998 Order in Docket No. 97-07505.¹

BSE's objection is based on both business and legal concerns. From a business perspective, as explained in more detail below, further delay will damage BSE's ability to compete for the multistate local service business of its potential customers. The prospect of delay creates additional concern in light of a developing national trend in the regulation of local competition that is consistent with BSE's proposal. In addition, BSE believes that the Hearing officer's recommendation, while rightly concerned with principles of comity and judicial economy, would run afoul of the applicable

¹ Appeal No. 01A01-9811-BC-00593

Tennessee statute.² BSE proposes below a procedure that would accommodate these principles within the statutory requirements.

BSE proposes that the Authority proceed with timely consideration of BSE's application. With the Authority's agreement to proceed within the time frame previously agreed to by BSE, BSE agrees (and would welcome the Authority as a joint movant) to seek a stay of the judicial proceeding. That stay would alleviate the current need for the Authority's staff to certify the record, and would alleviate the current need for all parties, including the Authority, to prepare briefs and conduct oral argument. Depending on the outcome of this proceeding, the need for such activities might be permanently eliminated.³

In any event, BSE's proposal makes efficient use the resources of the Authority and the Court of Appeals. The procedural schedule in this docket is near completion. Discovery is complete. All that remains is a hearing, which is likely to be brief, and issuance of a final order, both of which can be accomplished within the time agreed to by BSE.

BSE is not interested in playing legal games to waste the Authority's time and valuable resources. It is not the pariah the intervenors would like the Authority to believe. Its purpose in Tennessee, as in every other state where it has applied, is to provide services to consumers and business customers that are currently not available. In short, BSE has a business purpose like any other competing telecommunications services carrier ("CLEC"). It is not, as some have suggested,

² TCA §65-4-201(c), enacted in 1995, requires that an order be entered within sixty (60) days of an application for a certificate. At the Authority's request, BSE agreed to a sixty (60) day extension of this period. The indefinite delay suggested by the Hearing Officer's recommendation would contravene this requirement.

³ If a statewide certificate consistent with BSE's proposal is granted, BSE would withdraw its pending appeal. If BSE is denied statewide authority, an appeal of this proceeding could be consolidated with the pending appeal.

a scheme by BellSouth Corporation to skirt regulation. It is a company that wishes to provide services in Tennessee under safeguards that have been found to be acceptable in virtually every other jurisdiction where BSE has sought certification.

BSE filed its first application for certification in Tennessee in October, 1997 in Docket No. 97-07505. In a decision reached on September 15, 1998 and memorialized in an Order issued December 8, 1998, the Authority denied BSE certification in territory served by BellSouth Telecommunications, Inc. ("BST"). After the Authority reached its decision on September 15, 1998 in Docket No. 97-07505, BSE communicated to the Authority informally its preference for making an effort for additional authority in a new application in a new docket to satisfy the concerns raised by the Directors. BSE's new application was filed on December 18, 1998.

It was never BSE's intent to use the appeal process to gain certification in Tennessee. However, SECCA's Motion to Dismiss gave BSE no other option. Had the Authority granted SECCA's motion in the absence of an appeal by BSE, BSE would have been left with no practical means to gain certification. Now, because it took the only course that sound business principles would permit, BSE is faced with the prospect of further delay. At some point, hopefully, when this proceeding returns to BSE's new application and the substantive issues surrounding BSE's certification in Tennessee, and BSE can be assured that a timely hearing and decision are forthcoming, the need for the appeal will have dissolved. However, BSE cannot control the intervenors' actions. If they are intent on delaying BSE's entry as a competitor, BSE must leave open every option to obtain the right to provide competitive service in Tennessee. This market is too important to BSE's plans for it to do anything less.

In BSE's new application, which is the subject of this docket, it does not ask the Authority

to reconsider its action taken on BSE's first application. Rather, it specifically responds to concerns raised by the Directors in Docket 97-07505 by providing specific competitive safeguards as requested by the Directors.⁴ Further, BSE's application and testimony filed in this case present new evidence supporting certification on a statewide basis.

BSE is a separate affiliate from BST, established to provide retail telecommunications services for which a CLEC certificate is required. This concept is hardly unique to BellSouth. It is a concept that has gained acceptance throughout the nation, as discussed in BSE's testimony filed in this docket. It is perplexing that BSE's certification has proven uniquely difficult in Tennessee. Intervenors are quick to point out that the Kentucky Public Service Commission also denied BSE certification in BST's territory – a decision that is currently under reconsideration.⁵ However, BSE is certificated statewide in six states in the BellSouth region. BSE, in previous filings in this docket, has referenced decisions by other in-region state commissions, (e.g. the Florida Public Service Commission) as well as the comments of some individual commissioners that are supportive of the proposal put forth in Tennessee by BSE. GTE, Ameritech and other incumbent local exchange carriers ("ILECs") have CLEC affiliates that are permitted to compete in their respective ILEC's territories. In Tennessee, Sprint and Citizens have affiliates licensed statewide.⁶

⁴ In his public deliberation in Docket 97-07505, Director Greer stated: "My inclination is to grant BSE's CCN statewide, but I would want certain safeguards in place to monitor the affiliate transactions and performance. However, neither the applicant nor any of its affiliates have offered any such safeguards to justify such a granting."

⁵ In Docket 97-07505, the parties discussed the fact that the Texas Public Utilities Commission denied certification to a CLEC affiliate of GTE, citing a unique Texas statute which specifically prohibits certification of ILEC affiliates. No such statute exists in Tennessee.

⁶ BSE notes that Section 253 of the Federal Act prohibits barriers to entry and requires competitively neutral standards by state commissions in assessing applications for licensure. BSE respectfully submits that the Authority should not apply a standard to BSE that is inconsistent with the statutory requirements in TCA §65-4-201

The Federal Communications Commission ("FCC") has recently proposed, in Docket 98-147, that ILECs may establish affiliates for the provision of data services. Under that proposal, the CLEC affiliate would be structurally separate from the ILEC based upon separation requirements set forth in Section 272 of the Federal Telecommunications Act of 1996 ("the Federal Act"). There can be no denial that the FCC's proposed action lends significant credence to the adequacy of these safeguards to allay regulatory concerns regarding anticompetitive behavior beyond simply the provision of long distance service. These are the same structural safeguards that BSE has proposed in its current application.

Several state commissions, notably New York, Illinois, California and Texas, submitted comments to the FCC in Docket 98-147 specifically on the issue of the proposed affiliate and safeguards. All supported the affiliate and safeguards as proposed by the FCC. In its comments, the New York Department of Public Service stated "there is a possibility that ILECs [choosing the separate advanced services affiliate option] will have an additional incentive to provide all CLECs reasonable access to their underlying basic local networks because the affiliate will also require such access". The California Public Utilities Commission endorsed the adequacy of the proposed safeguards in stating "the affiliate must be required to operate independently from its BOC affiliate, as is required of a BOC's Section 271 affiliate...". Even the Texas Public Utilities Commission suggested only some additions to the FCC's proposed safeguards, but did not oppose the establishment of the affiliate. The suggested additions involve rules for information sharing and communication between the ILEC and the affiliate. The Illinois Commission addressed how it could

and the standard applied to the other CLEC applications considered by the Authority. To do so would risk violation of the very statutes that Authority is responsible to enforce, including TCA §65-4-123.

regulate against any attempted favoritism of the CLEC affiliate by the ILEC. The Illinois Commission pointed out to the FCC that it had authority to review any ILEC tariff if any party believes that the rates, terms or conditions favored an affiliate. Similarly, Section 252(e) of the Federal Act provides the state commissions with the authority to reject negotiated agreements between an ILEC and a CLEC if the agreement is deemed to be discriminatory.

BSE does not contend that the Authority should blindly follow these agency decisions, rather than making its own independent decision based upon the evidence presented in this case. However, in the face of near unanimous support from other regulatory agencies for the concepts that BSE has adopted here, it is difficult to understand why BSE is being denied the right to do business statewide in Tennessee - and now faces the threat of further delay in its effort to present its case to the Authority. These commissions face the same or similar public interest and competitive issues as the Authority. Not only has BSE certification been found acceptable by most state commissions, but in many instances it has been seen as a preferred course of action.

BSE will be significantly damaged if the Hearing Officer's recommendation is adopted and this case is held in abeyance. One might suggest that there is little problem with delaying a hearing for BSE, given the fact that it recently became operational in its first market, Tampa, Florida, in October, 1998. The problem lies in BSE's inability to properly execute its business plan because of its current regulatory limbo in Tennessee. BSE has consistently described its plan to offer services across a broad range of states within and beyond the traditional BST territories. Of course, to implement this type of plan, BSE must be authorized to provide services in all of these states. Tennessee is a significant component to this plan, and the continuing uncertainty and now potential

delay in obtaining certification together present a major obstacle in implementing this plan.⁷ This presents, potentially, a more problematic issue than in-region long distance relief. While securing Section 271 relief has been delayed beyond what most initially anticipated, there is confidence that a process exists with a road map to follow which will ultimately lead to authority being granted. There is less certainty concerning BSE's road to statewide certification in Tennessee.

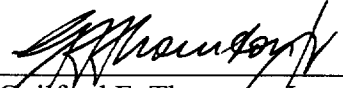
Even if the Authority does not adopt the view that market entry by CLEC affiliates such as BSE will actually promote competition, it can be assured by the overwhelming majority of commissions which have concluded that these safeguards are adequate to mitigate against any potentially anti-competitive impacts. Rewarding the legal manipulations of the intervenors at this juncture would not safeguard the public interest, but would deny the consumers of Tennessee the choice of a new competitor in the market.

BSE's new application goes beyond the requirements in Tennessee statutes in order to provide the safeguards sought by the Directors to ensure no anticompetitive behavior. Further, BSE's new application presents new evidence that BSE's entry into the market will provide competitive options to consumers and promote the public interest. BSE has now made an offer to stay the schedule of its case before the Court of Appeals pending resolution of this docket. Holding BSE's application in abeyance will violate TCA §65-4-201. Judicial economy requires that the Authority move forward to a hearing in this case. Accordingly, BSE requests that the Hearing

⁷ A local example is useful to illustrate the potential damage further delay would cause BSE. A recent article in the *Nashville Business Journal* (attached) discusses BSE's application in Tennessee. That newspaper is owned by a parent company which publishes newspapers in approximately 40 cities across the country. If that parent company decides to purchase its local telecommunications needs from a single supplier, no BellSouth entity could compete for that account; nor could any BellSouth entity provide any assurance that it will be able to do so in the foreseeable future..

Officers' recommendation to hold this case in abeyance be denied and that a hearing date be scheduled in this matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Guilford F. Thornton, Jr.", written over a horizontal line.

Guilford F. Thornton, Jr.
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Attorneys for BellSouth BSE, Inc.

FEBRUARY 19-25, 1999

BellSouth seeks state nod for subsidiary to compete

By Richard Lawson

A BellSouth subsidiary wants what competitor Nextlink has in Tennessee — the ability to offer packages of telecommunications services across the state under less stringent regulatory rules.

State regulators are expected to decide by early April whether BellSouth BSE Inc., a subsidiary of Atlanta-based BellSouth Corp., can get equal treatment under state laws.

BellSouth BSE lost a battle in December when the Tennessee Regulatory Authority denied it operation in BellSouth territories such as Nashville and Memphis.

BellSouth BSE applied again about 10 days after the TRA's Dec. 11 order.

As the dominant phone company, BellSouth faces more stringent federal and state regulations than the local competitors known as competitive local exchange carriers. In 1995 and 1996, the state and federal government created two sets of rules to boost local competition.

BellSouth, for example, has to seek approval for pricing and long-term contracts from the Tennessee Regulatory Authority but its competitors don't.

BellSouth BSE faces stiff opposition at the Tennessee Regulatory Authority from BellSouth's local telephone competitors. They argue that granting BellSouth BSE equal status could potentially lead to anti-competitive behavior, an argument the TRA agreed with in its December ruling.

"They want to pretend they are Nextlink," says Henry Walker, an attorney with Nashville law firm Boulton Cummings Connors & Berry.

He represents Southeastern Competitive Carriers Association, a coalition including Nextlink Tennessee and other BellSouth competitors throughout the Southeast United States fighting BellSouth BSE's effort.

The companies argue BellSouth Corp., the parent of BellSouth Telecommunications and BellSouth BSE, created the subsidiary so that BellSouth Telecommunications can avoid state and federal regulations aimed at promoting competition.

Then there is the danger, they say, of predatory pricing to undercut the competitors and the potential for preferential and

discriminatory treatment. They assert BellSouth BSE essentially will pull the most profitable customers from BellSouth Telecommunications.

"They potentially want to cherry pick from themselves," Walker says.



Walker

BellSouth created the subsidiary in August 1997 to resell the dominant company's services or any other competitive carrier's service. BellSouth BSE also may become a facilities-based carrier, meaning it owns and operates phone lines and switching.

BellSouth BSE says it can help promote competition and push down prices for telecommunications services as well as provide customers with a broader range of services that BellSouth can't offer now because of regulations.

The subsidiary essentially wants what its competitors can do. They can operate nationally, providing a Tennessee-headquartered company, for example, with a deal covering its operations in other states.

"Competitors don't limit themselves geographically," says BellSouth BSE President Robert Scheye. "We want to be able to offer a variety of package services."

The packaged services could include cellular, Internet, long distance and local phone service, in essence, one-stop shopping. Regulations prevent BellSouth Telecommunications from providing package services in Tennessee, says David May, regional director of BellSouth Telecommunications in Tennessee.

BellSouth BSE denies BellSouth is trying to skirt federal and state rules. "The focus we have really is market focus," Scheye says.

In its application TRA now is considering, BellSouth BSE sought to ease TRA's concerns over potential anti-competitive behavior by agreeing to voluntary price floors to prevent price squeezing.

May notes that BellSouth BSE would be treated like any other competitor.

"If BellSouth BSE were operational, it wouldn't have any advantage," he says.

Richard Lawson can be reached at 615-248-2222, ext. 109, or by e-mail at (rlawson@amcity.com).

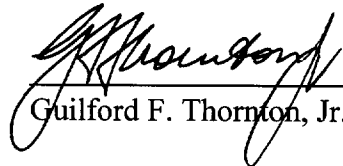
CERTIFICATE OF SERVICE

I, Guilford F. Thornton, Jr., hereby certify that I have served a copy of this pleading on the individuals listed below on this the 24th day of February, 1999.

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